

DECISION
BY
COURT OF SESSION,
(SECOND DIVISION,)
RESPECTING
CHARTER
OF
The Faculty
OF
PHYSICIANS AND SURGEONS,
GLASGOW.

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SUPREMA LEX SALUS POPULI.  
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GLASGOW :
PRINTED BY R. CHAPMAN, TRONGATE.

M,DCCC,XIX.

THE UNIVERSITY OF CHICAGO

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DECISION

OF

Court of Session.

IT may perhaps be interesting to the public in general, and particularly of importance to Medical practitioners in the west of Scotland, to know the precise state of the question, which was lately decided by the Court of Session, with regard to the rights of the Faculty of Physicians and Surgeons of Glasgow. The following statement has been furnished by a Gentleman, whose situation made him fully acquainted with the details of the process.

The Faculty, as a corporate body, take their origin from a Charter, under the Privy Seal of Scotland, granted in the year 1599 by James VI., and ratified by the three Estates of Parliament in the reign of Charles II. This Charter gives to Maister Peter Low, and Robert Hamilton, and their successors, indwellers in the City of Glasgow, full power to examine, as to their literature, knowledge and practice, all persons professing the art

of Surgery in the Counties of Lanark, Renfrew, Ayr, and Burgh of Dumbarton. It also empowers them to license those found skilful, and to fine and amerce whoever refuse to be examined; or, when examined, are judged not duly qualified. This important trust, calculated for the security of the public, and conferred, with this view, by Royal authority, whose chief function is to watch over the safety of the lieges, the Faculty, for more than two centuries, have continued to discharge, sometimes with less, sometimes with more rigidness, according as flagrant cases of ignorance and presumption in the Healing Art presented themselves to their view.

Of late years, the practice of ignorant and unlearned persons, taking upon themselves to exercise the functions of Medicine, became more prevalent than formerly; and a very notorious case of this kind came under the view of the Circuit Court, in the autumn of 1811. The present Lord Justice Clerk, then on the Bench, took occasion, strongly and authoritatively, to call upon the Faculty to exercise the power, which he understood was contained in their Charter, in correcting such abuses, disgraceful to their profession, and highly dangerous to the community. On the 24th of March, 1812, the High Court of Justiciary, before whom the Charter was laid, passed an Act of Adjournal,

by which they recommended to the Faculty to persevere in the exercise of the power contained in the Royal Grant, and Parliamentary Ratification; and enjoined all Sheriffs, and other Magistrates, in their bounds, to be aiding and assisting to them in the legal discharge of this duty. In consequence of this, the Faculty, by public advertisement, called upon all persons not already licensed, to appear for examination without delay. Some obeyed, others were contumacious. A summons was therefore raised before the Court of Session, against a number of individuals, concluding, that those who had refused to submit to the necessary examination, should, by the authority of the Court, be interdicted, and discharged from practising the art of Surgery, in future, within the jurisdiction mentioned in the Grant. The greater part of those, against whom the Summons was raised, allowed judgment to pass in absence; the rest gave in defences. One acknowledged, that he had never attended lectures, or, in any other way, had acquired medical erudition; but having a natural skill in herbs, he had a right to visit patients and prescribe, notwithstanding that he had been found grossly ignorant by the Faculty, because, forsooth! he had once carried a musket in a Fencible Regiment: that his privilege as a discharged soldier entitled him to take charge of the health of His Majesty's subjects, as well as to mend their shoes,

without challenge, either from the Faculty of Surgeons, or the Corporation of Cordiners. The Court soon dismissed this plea ; but, in the mean time, this Defender thought proper to *order* a degree in Medicine from one of the *Manufactories* beyond the Forth, and thus found himself in a situation to join issue with the Faculty on another ground. A second Defender alledged that he had served in the Royal Navy, and therefore entitled to exemption from the demands of the Faculty ; but having been unable to produce the necessary certificates of his service, judgment was given against him, he was incarcerated in the Tolbooth of Glasgow, and was afterwards liberated, on granting a bond of desistance, not to practise Surgery, for the future, within their bounds.

The remaining gentlemen, who declined our authority, had more respectable defences, and they urged them with a keenness and perseverance, which were justifiable on their part, and ultimately beneficial to the Faculty, as this brought the claims of their Charter fully before the Court, and we hope has given us a security, that the points now settled will never again be brought into discussion.

The plea advanced by these gentlemen, who, for the sake of distinction, may be called Gradu-

ated Defenders, consisted of two parts : in the first place, that the Faculty of Physicians and Surgeons, had no title to the Royal Gift granted by the Scottish monarch, and ratified by the three Estates of Parliament : secondly, that the Academic degrees, which they had received, gave them a right to practise every part of the Healing Art without challenge from the Faculty, even though its claims on the Charter were well established.

On the first ground of defence it was maintained, that the succession to Peter Low, who is designed *Chief Surgeon to the Prince*, and Robert Hamilton, *Professor of Medicine*, cannot devolve to the Faculty, but to whatever persons hold these offices at the present day ; that is, say the Defenders, to two distinguished Members of the University, the one Physician to the Regent, the other Professor of Medicine. The Faculty considered this as a mistake, for the professorship of Medicine in the University was not established until more than a century after the Grant, and, in the language of the time, Professor and *Practitioner* were synonymous. The Parliamentary Ratification, seventy years after the date of the Grant, is a proof that it was not made to Low and Hamilton as individuals, but to a corporate body of which they were the representatives ; and therefore it is conceived, not in behalf of a new Chief Surgeon to the Prince,

and a new Professor of Medicine ; but in favour of the *then* present Surgeons, Apothecaries and Barbers, within the Burgh of Glasgow, and their successors. Upon this ground, (the designation of the body in whose behalf the Ratification is made,) the Defenders founded their strongest objections to the Faculty's title to their Charter. They contended, that a Faculty of Physicians and Surgeons is never once mentioned in the Royal Grant, or Ratification by Parliament : that the functions of the Charter were vested in a Corporation of Surgeons and Barbers, now extinct ; that in the year 1722, the Surgeons renounced their privileges as members of this incorporation ; the Barbers were received into the Trades House by a new municipal Charter, and the remaining part of the Body were never afterwards incorporated by authority. They united themselves into a voluntary association under their present name ; but have no more right than their repudiated brethren to take up the chartered claims and functions of the original Corporation. The Royal Commission was ratified to the Surgeons, Apothecaries and Barbers, *allegedly*, and as that body sunk into dissolution nearly a century ago, its powers and functions must be considered as now annihilated. Every Corporation must appear in Court with its corporate name ; and the pursuers are therefore not entitled to sue for the rights of the ancient Cor-

poration of Surgeons and Barbers, by the more dignified title they have now assumed. The present action might have been maintained by the Deacon of the Incorporated Surgeons and Barbers, when that body had an existence, but is altogether incompetent to a self-created association, who have no doubt a right to manage their own affairs, but cannot legally assume control over the affairs of others, or claim the privileges of a Charter, which, by the death of the body in whose favour it was ratified, has now become a dead letter.

THE FACULTY'S ANSWER TO THIS ARGUMENT.

At the revival of literature in Europe, the Monks, and other Ecclesiastics, were the sole depositaries of all the learning and science then known. Their spiritual functions, too, brought them often to the bedside of the sick ; and from these two circumstances, they were the chief persons employed as medical practitioners. But they were forbidden by their superiors to leave the cloisters where they resided ; and it was held below the dignity of their rank to perform some of the manipulations, which the cure of diseases required. This humble office they entrusted to their servants, who at the same time were employed in giving that tonsure to their masters' heads, which the superstition of the time held necessary

to the clerical profession. Thus a union was formed between two offices, not very intimately allied, and Shaving and Surgery became combined in the same persons. But in the progress of human improvement, there is a tendency to a division of labour. Persons by study, observation and reflection, would acquire superior skill and dexterity in one part of the combined trade, and would naturally neglect the other. Hence it would happen, that one set would confine themselves to the operative part of the healing art, and would abandon the use of the razor and similar implements: while others, less aspiring, would be chiefly employed in *barbery*, and would never venture beyond the humble operations of the allied art. Thus arose the distinction between surgeons and barbers, according as the individuals devoted themselves almost exclusively to either part of what was originally a common craft. This was the state of things at the date of our Charter. There were then in Glasgow a number of persons, who confined themselves to the operative part of healing; while there were others, who were strictly called *barbers*, though they might still accustom themselves to let blood, dress sores, and perform other simple operations in Surgery. It was in consequence of this alliance, that Barbers were said to be a *pendicle* of Surgery, and were on this account assumed into the same society with the Sur-

geons a few years after the date of our Charter. But in the Gift of James VI. the Barbers are not mentioned at all, and when the Surgeons assumed them into their Society, there is a special condition, that they should not *meddle with any thing further belonging to Surgery*, than the simple and humble operations, which in almost all the countries of Europe they were accustomed to perform. Notwithstanding this connexion, the Surgeons of themselves, as a distinct body, appeared in the Court of Session in the year 1635, and obtained a decision against the Magistrates of Glasgow, in defence of their Chartered rights. Some time afterwards the joint body became desirous of adding to their other privileges the municipal rights, which arise from their being constituted one of the incorporated Crafts of the Burgh: but in the petition for a letter of Deaconry, there is introduced a saving clause, that the deed craved from the Town Council should not *prejudice the old gift granted by the deceased King James*. In the regulations which followed the grant of the Magistrates, there was a careful provision to prevent the Barbers from interfering with the business of Surgery. Thus though the Surgeons and Barbers formed one Burgh Corporation, they still recognized, within themselves, a distinction of functions and property, belonging peculiarly to the different professions. The Barbers always

allowed, that, as they could not exercise any of the duties of James's Grant, so the funds, arising from the discharge of these duties, belonged properly and peculiarly to the Surgeons. The literary property too, the books, anatomical preparations, and natural curiosities, were held to belong to the Faculty of Surgeons, and their successors only ; while the tables, and other furniture of their Hall, were declared the property of the common Corporation. The Parliamentary Ratification of the Charter, no doubt, took place after the Surgeons and Barbers were a joint Burgh Corporation ; but in the ratification itself the grant is still limited. *It was approven in so far as it can be extended in favour of the present Chirurgeons, Apothecaries and Barbers, and no farther.* It could not extend to the whole ; it must of necessity be limited to that part of the corporate body, who alone were qualified to discharge its functions. Our associates continued to sit at the same table with their medical brethren, and decided on questions with regard to their common property ; but never attempted to interfere with the functions of the Faculty as Examinators in Surgery. This was a duty not belonging to the common letter of deaconry, but to the Royal Grant, in which they had no share. The Surgeons, therefore, chose their peculiar officers for this department, and had a licensing Visitor or Deacon, who was only an

ordinary member in the meetings of the full corporation.

From these circumstances, it will be easy to estimate the effect of the separation which took place betwixt the discordant materials of this Body. Their bond of union was at first of a charitable, and then of a municipal nature, and never had any regard to the jurisdiction created by the Royal Grant. At their separation the two parties divided their common stock; the Surgeons renounced into the hands of the Magistrates their share in the Burgh rights; the Barbers consented to the arrangement, and craved a new letter of Deaconry for themselves. The Surgeons did not afterwards form any new association: they only continued to be, what they were, both before and during their alliance with the other party, a body incorporated under a Royal Commission, which they never relinquished, and which neither their separation from the Barbers, nor the abandonment of their Burgh constitution, ever could take away. The Faculty therefore maintain, that they are the true and legitimate successors of those in whose favour the Royal Grant was made and ratified; and that the continued possession, which they have established, gives them as indubitable a right to act upon it, as if they were expressly named in the original Charter.

Here we endeavoured to show that the rights derived from our Charter were not lost by desuetude; that we had continually discharged its functions, by exerting a control in our bounds over those practising Surgery or Medicine without a Diploma; by licensing the qualified, and by prohibiting those, who were either contumacious, or who, when examined, were found not duly skilful and expert. We thus contended, that our claims on the Defenders were neither assumed without right, nor raked from oblivion to serve any sinister purpose against individuals; but originated from a Commission, entrusted, for the public good, to our predecessors; of which we, as a body, had always maintained uninterrupted possession.

SECOND ARGUMENT.

The Graduated Defenders maintained in the second place, that the Academic degrees, with which they were invested, entitled them to practise every part of the Healing Art without challenge from the Faculty, even though their title upon the Charter was well established.

The Degree of Doctor of Medicine confers the right *ubique terrarum*, to practise every part of the art of Healing, whether by the regulation of

Diet, the exhibition of Drugs, or Manual Operation. The Graduate cannot be restrained from using any means suggested by his Science for the cure of the patient. His duty is to heal the mortified limb by every mean in his power; and, when all other resources fail, there is no reason why he should be restrained from arming himself with the knife, and proceeding to amputation. Medicine is a generic term, including all the subordinate branches; and as the graduate in his *curriculum* of education, attends lectures on every department, so his diploma gives him an unlimited right to practise every method of cure. He *may* confine himself to the art of prescription, and leave operations to others; but, in the rights and privileges of his Diploma, he is unrestricted. The Faculty, therefore, may have a right to examine all practitioners in Surgery, not otherwise licensed; but can have no jurisdiction over graduates, who are already empowered by a paramount authority, to use every sanative resource, operative as well as medicinal.

FACULTY'S ANSWER TO THIS ARGUMENT.

The degree of Doctor of Medicine has, in no Country, been received as evidence of the possessor's qualifications in Surgery, or held sufficient to entitle him to practise that art. The Royal

Colleges of London, Edinburgh, and Dublin; the Medical Boards for the Army, Navy, and India Service, pay no regard to the most respectable of these degrees, but subject the holders of them to a surgical examination, as much as other candidates, whose heads never touched the graduating cap. The term Medicine, in such diplomas, is used in *contradistinction* to Surgery, and relates solely to the knowledge and art of Medical prescription, in the cure of internal and systematic diseases. Surgery, on the contrary, is concerned in the treatment of external Maladies; and such, particularly, as require manipulations for their cure. This distinction being founded in the nature of things, is as old as Medical Science itself. It is clearly kept in view in the Gift, upon which the Faculty found their claim. This letter gives authority to call before them all such persons as practise Surgery, without any exception, as there was no other Faculty that could examine and license in that art. There is no exemption, there is no saving clause for those who hold Academic degrees. But, with regard to Medicine, the powers vested in the Faculty are different; here there is no authority to examine; we have only to require, that Practitioners in this particular art, show a proper testimonial from a *famous University where Medicine is taught*. Every well educated Graduate will

study the principles of Surgery; but, as his skill in this department, is no part of his inaugural examinations, there is a propriety that he should be examined in Surgery, when he afterwards intends to devote himself to this part of the Healing Art.

But the strongest proof that a degree in Medicine does not confer a right to practise Surgery, is furnished by an Academic body, who are certainly the best judges of the powers conveyed by their own diploma. In a Memorial presented by the University of Glasgow to the House of Commons about two years ago, the learned Senate distinctly avow, that Surgery is a separate department; and that until they had a distinct establishment for Surgery, and a Professor appointed to give lectures and demonstrations on it exclusively, they did not think themselves warranted to grant *brevia* or diplomas for its practice. It was their rule not to give degrees in any department of knowledge, until they had a provision for the regular teaching of it. Upon this principle, the degrees in Medicine, which they have given for above a century, could not contain a license to practise Surgery, as a professorship in that department has been established only two or three years.

The above is a summary of the pleadings on both sides of this cause. Lord CRAIGIE, on the 14th November 1815, gave the following Judgment. Having considered the Memorials, and additional Memorials for the parties, writings produced, and whole proceedings, FINDS that the titles produced by the Pursuers, as explained and confirmed by the Acts of Possession condescended on by them, afford a sufficient title to carry on such an action as the present; FINDS, that in virtue of the diplomas and other testimonials produced by the Defenders (Graduated Defenders), these parties are authorised, without challenge, to practice *Medicine* within the district specified in the Royal Grant, founded on by the Pursuers; FINDS, that no persons can, within the said district, practice *Surgery*, or carry on the business of an Apothecary or Druggist, without such an examination as is there prescribed; FINDS, that the Defender (late of the Fencible Regiment) has been properly prohibited from carrying on the profession of Medicine or Surgery, or that of an Apothecary, as not being sufficiently qualified; and DECERNS and DECLARES accordingly.

This Interlocutor afterwards came under review before the Second Division of the Court, and was

there affirmed. The whole Bench, Lords JUSTICE CLERK, GLENLEE, BANNATYNE, ROBERTSON, and CRAIGIE, were unanimous with regard to the title of the Faculty to claim the rights of the Royal Charter, and to call on every Practitioner in Surgery within the jurisdiction to submit to examination. But Lords JUSTICE CLERK and ROBERTSON were of opinion, that a degree in Medicine entitled the holder to act as a Surgeon without such an examination; while Lords GLENLEE and BANNATYNE agreed in this point with the Lord ORDINARY, that to the right of the Faculty to examine all Practitioners of Surgery within the district, the possession of an Academic Diploma affords no exemption.

By means of a Reclaiming Petition, the cause came again before the Court, and the Interlocutor of the Lord Ordinary was again affirmed. The Defender, who had claimed a right to practise from his service in the Fencible Regiment, was now *armed* with a few Lecture tickets, and a Diploma from St. Andrew's, and therefore took his station with his Graduated brethren. The Lord Justice Clerk also changed his place, and now fell in with the majority, leaving Lord Robertson alone in supporting the Academic degree as containing a title to practise Surgery. It is

impossible for us to say positively, what argument induced the Presiding Judge to alter his opinion; but it may be stated, that in his speech on the occasion, he noticed particularly the Memorial of the University, a copy of which the Faculty had then for the first time brought into Court. The Lord Justice Clerk had been Rector of the University at the time this Memorial was drawn up, and it is probable this circumstance enabled him to understand better the true import of a Medical degree.

By this Final Decision, our Chartered Rights are clearly shown to be a part of the Law of the Land. No person, even the holder of a degree in Medicine, no person within the Counties of Lanark, Renfrew, Ayr, and Burgh of Dumbarton, can legally practise Surgery, or carry on the business of an Apothecary or Druggist, without undergoing an examination by the Faculty.

There is one point, however, in which we have failed, and to the decision we bow with submission. The loose manner in which degrees in Medicine are given, by two Universities in the North, is well known, and the recital of it has often made us blush, when we were disposed to boast of the literary Institutions of our Country. The Faculty

thought, that their Rights were calculated in part to correct this abuse, by excluding the holders of such degrees from practising even Medicine in our district. We could never vaunt of our Charter as an elegant composition, but we thought the Royal Scholar who granted it, would never use words which had no meaning. It appeared from the face of the Letter to Low and Hamilton, that a degree from *every* University was not intended to entitle its holder to practise Medicine in our bounds; two specific conditions are required—it must be a *famous* University, and a University *where Medicine is taught*. We therefore presumed, that we were warranted to refuse giving effect to degrees from a University *not famous*, and where Medicine *was not taught*. This character we applied to the University of St. Andrew's, where one of the Defenders obtained his degree; and we contended, that in whatever estimation that Academic body may be held as a literary seminary, it could in no sense of the word be styled *famous* for Medicine, for we offered to prove, that no branch of Medical science is at present taught there. The Court, however, found this reasoning erroneous, and decided, that a Diploma from St. Andrew's gave as valid a title to practise Medicine in the Faculty's bounds, as one from Edinburgh or Glasgow, where there are

Universities, which we are proud to call *famous*, where every branch of Medical science is taught with ability and success, and where candidates for degrees must undergo a rigid examination.

The Faculty do not regret the expense and trouble which this process has occasioned. It has put the validity of their Charter beyond doubt; they find themselves vested with a right, creditable to themselves, and beneficial to the community. The evil, which the Charter was intended to obviate, has been often complained of, and various plans have been proposed to the legislature, to correct it in every part of the united kingdom. It has been suggested that different districts should be formed, and put under the authority of separate Medical Boards, who should be empowered to grant licenses to practitioners of every kind; and that pains and penalties should be imposed on those, who interfere with the functions of the healing art without undergoing regular examinations. This measure, acknowledged by all to be salutary for the public, has been in part carried into effect by our Charter. The most important district of Scotland has been placed under the jurisdiction of the Faculty, and they hope they are not deficient in abilities, learning, and independence of mind, to discharge these functions in a

manner, which will add respectability to the profession, and secure the best interests of the public. They are sensible that the task may be, in some cases, an invidious one. They will be obliged to call on Gentlemen to be examined, whom they personally know to be qualified without any such trial. Such is the estimation in which we hold degrees from Edinburgh and Glasgow, that we candidly confess, neither the profession nor the public would, perhaps, sustain any injury, were the holders of them allowed to practise Surgery without farther examination; but our Charter makes no exception; and if we discharge the Commission entrusted to us, we must of necessity discharge it to its full extent, for it does not contain any dispensing power. Besides, there are other diplomas in Medicine, for which we do not feel the same respect; and we think it our duty to employ the power vested in us, to prevent such diplomas from being used as containing a title to the profession of Surgery. The Supreme Court has given full effect to them as carrying a right to practise Medicine in our bounds, and with this decision we must acquiesce; but the acknowledged right which we possess, of examining every graduate who acts as a Surgeon, will enable us, in a great measure, to reduce these marketable degrees to their proper level, as conferring merely an empty name.

This we can do consistently in no other way, than by adhering rigidly to the full extent of our Charter, and subjecting the holder of every Academic degree, who practises Surgery, to a regular examination. Graduates, who hold well-earned diplomas, and all others, who are truly learned, will, we are convinced, count it no hardship to submit to a general law, the operation of which is calculated to advance the credit of the profession, by excluding the ignorant and unskilful.

F I N I S.

Glasgow :

Printed by R. Chapman.

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1819.





